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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARIA A. YOUNG, Defendant and Appellant.	D052432 (Super. Ct. No. SCD207774)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Affirmed.

A jury convicted Maria A. Young of two counts of making a criminal threat (counts 1 & 2: Pen. Code,[1] § 422 [victims Stephanie Wright and Gary Rossio, respectively]); and one count each of using the personal identifying information of another person for an unlawful purpose (count 3: § 530.5, subd. (a)), false personation of

1 All further statutory references are to the Penal Code.

another with publication of a document in that person's name (count 4: § 529, subd. (2)), and false personation of another in such a manner that the personated person was subject to criminal charges, civil action or other liability (count 5: § 529, subd. (3)). The court sentenced Young to an aggregate state prison term of three years four months.

Young appeals, contending her convictions on counts 1 and 2 should be reversed because the court's giving of CALCRIM Nos. 223 and 302 (discussed, *post*) violated her right to due process under the Fourteenth Amendment to the United States Constitution as the challenged instructions prejudicially undermined the presumption of innocence and shifted the burden of proof to her to prove her innocence. We conclude the court did not commit instructional error or violate Young's right to due process. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

From 2002 until May 2006, Young, who is African-American, worked as a police officer for the Department of Veterans Affairs at the VA Medical Center in La Jolla (the Medical Center). Young's supervisor, Alvin Pittman, was chief of the Veteran Administration's Police Department at the Medical Center.

Beginning in 2004, Pittman started receiving complaints that Young's behavior at work was rude, aggressive, disrespectful and unstable in situations that involved patients and other employees. In one incident, Young allegedly put her hand on her gun while talking to a driver who had driven in the wrong direction in the Medical Center parking lot.

As a result of these complaints, Pittman asked to have Young evaluated regarding her ability to continue carrying a handgun. In September 2005 Stephanie Wright, the director of human resources, notified Young in writing that she would have to be evaluated to determine whether she was authorized to continue carrying a weapon. Based on that evaluation, Medical Center Director Gary Rossio revoked Young's authority to carry a firearm.

Because Young was no longer authorized to carry a gun, she could no longer work as a police officer at the Medical Center. Rossio conducted a termination meeting with her. In May 2006, after she declined a housekeeping position at the Medical Center, Young's employment was terminated. She thereafter filed an Equal Employment Opportunity (EEO) complaint, and the EEO administrative proceedings were scheduled to begin in April 2007.[2]

On April 13 Young bought an express pay cash card at a FedEx Kinko's store on Jackson Drive in La Mesa. That same day, someone opened a Yahoo! e-mail account in Pittman's name (the Pittman e-mail account) at that FedEx Kinko's store.

On April 14 and 15 the Pittman e-mail account was accessed from IP address 68.7.31.238, which was assigned to Young as part of her personal Internet service subscription.

On April 23, a little after 6:00 a.m., a person wearing a hooded sweatshirt used a store computer at a FedEx Kinko's store in Kearny Mesa to send an e-mail from the

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2 All further dates are to calendar year 2007 unless otherwise specified.

Pittman e-mail account to a local television station, KFMB. The subject line of the e-mail sent from that e-mail account was "SAN DIEGO VA SHOOTING." The e-mail described the purportedly stressful and difficult nature of Pittman's job, as well as his power to access any medical record at the Medical Center and to hire and fire employees at will. The e-mail indicated that Pittman terminated the employment of an unnamed female African-American police officer for refusing to obey him and that his career and life would be over if she won her wrongful termination suit against him. The e-mail also stated that Pittman was "going out with a bang" in the "deadliest shooting in VA history" and that he was going to shoot and kill Wright, Rossio, and "anyone else who gets in my way."[3]

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[3] The e-mail stated: "The day has come for everyone to know just how stressful working in law enforcement can be and everyone at the VA Medical Center will soon understand how stressful my job is. My career is over and I am going out with a bang; hopefully it will be the deadliest shooting in VA history. The senior management will get a taste of what I am going through. Throughout my tenure as Director of Police & Security I have made some major decisions and I am stressed out and want it to end. With the help of staff doctors, I have used my position of authority to access medical records of veterans who are employees at the Medical Center without their knowledge to have them terminated or transferred to a different department, I authorized investigations that were unwarranted and unnecessary and made decisions not based on facts but what I felt was good customer service and benefits the Medical Center, I have destroyed careers of people who I felt was [*sic*] not team players and have made careers of those who I did as I wanted. Police management is comprised of individuals who are not qualified for the position for which I promoted them to and will do anything that I ask regardless if it is right or wrong, I also have police officers who will do anything that I asked of them regardless if it's right or wrong. With permission of Human Resources Director Stephanie Wright and Medical Center Director, Gary Rossio, I am allowed to make these stressful decisions without being questioned. I terminated a Police Officer who would not do anything that I ask and continuly [*sic*] refused and berated me. I knew this was wrong. The Officer is fighting the wrongful termination; which is why I want my side told accurately. I did not fire the officer because she is an African American Female but

Data from FedEx Kinko's files showed that the person who sent the threatening e-mail paid for the use of the computer at the Kearny Mesa FedEx Kinko's store by using the same cash card Young purchased on April 13 at the FedEx Kinko's store on Jackson Drive in La Mesa. An employee at that FedEx Kinko's store identified the person who used that computer as an African-American because she could see that person's hands typing, but she could not further identify the person because that person was wearing a gray, hooded sweatshirt. A gray, hooded sweatshirt seized from Young's storage locker was consistent with the sweatshirt worn by the person who used the FedEx Kinko's store computer in Kearny Mesa on April 23.

Pittman testified he had never had a Yahoo! account, and he did not send the threatening e-mail. Because of the reference in the e-mail to the termination of an unnamed African-American female employee, the use of the word "berate" that Young had used in meetings, and the nature of the complaints in the e-mail about the unauthorized use of employees' medical files about which Young had complained, Pittman thought the reference was to Young, who had been terminated and was the only African-American woman that he had hired during his tenure as Medical Center chief of police. Pittman concluded that Young had sent the e-mail.

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because she continuly [*sic*] refused and berated me. If she had not refused me but allowed me to help her and assist her with whatever made her so anger [*sic*] I would not have had to terminate her. If she wins I will be terminated and my life and career will be over. Before this day happens I am going to shoot and kill Ms. Wright, Mr. Rossio, medical center personnel, police officers & police staff and anyone else who gets in my way. I have the means and knowledge and is [*sic*] only sorry that I did not kill that Officer. When it is all over the deaths of everyone including my own will be on that Officer[']s conscience."

A thumb drive seized from Young contained a document, authored by "Maria" and last modified on April 15, which in turn contained many phrases and sentences that were identical to those used in the threatening April 23 e-mail. Another document found on the thumb drive—a letter from Young to Rossio dated March 3, 2006—contained complaints similar to those in the April 23 e-mail.

On April 23, as a result of the e-mail, the San Diego Police Department set up a command center in the Medical Center parking lot and escorted Pittman from his office in front of his staff. A captain from the San Diego Police Department questioned Pittman about the e-mail.

After Pittman read the e-mail, he became very concerned a shooting might occur at the Medical Center. Pittman and the other VA people named in the e-mail became very concerned for their safety. Pittman testified he was very embarrassed and upset by the fact the e-mail was written in his name.

B. *The Defense*

Young did not testify, and the defense rested without presenting evidence.

STANDARD OF REVIEW

The de novo standard of review applies on appeal in assessing whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

DISCUSSION

Young contends her convictions on counts 1 and 2 should be reversed because the court's giving of CALCRIM Nos. 223 and 302 to the jury violated her right to due process under the Fourteenth Amendment to the United States Constitution as the

challenged instructions prejudicially undermined the presumption of innocence and shifted the burden of proof to her to prove her innocence. We reject this contention.

A. *Forfeiture*

Before we reach the merits of Young's constitutional challenges to CALCRIM Nos. 223 and 302, we must first address the People's contention that Young forfeited these challenges because she did not object to those instructions in the trial court, nor did she suggest any clarifications or other corrections during the discussion of the jury instructions. Young acknowledges she did not object to the instructions she now challenges.

The California Supreme Court recently explained that "[t]he longstanding general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151 (*Rundle*).)

Young asserts the rule explained in *Rundle* does not apply here because she is claiming not that CALCRIM Nos. 223 and 302 required clarification or amplification, but that they are legally incorrect. For reasons we shall explain, the court's instructions under CALCRIM Nos. 223 and 302 correctly stated the law governing the definition and use of direct and circumstantial evidence, and a jury's evaluation of conflicting evidence, respectively. We conclude that by failing to object in the trial court to the portions of these instructions (discussed, *post*) she now challenges on appeal, Young forfeited her instructional error claims in this matter.

Notwithstanding Young's forfeiture of her claims, in the exercise of this court's discretion we shall address the merits of those claims, both of which concern the fundamental constitutional right to due process. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"]; *People v. Brown* (1996) 42 Cal.App.4th 461, 471 [an appellate court may address the merits of a "pure issue of law concerning a fundamental constitutional right" even though it was not preserved in the trial court].)

B. *Merits*

Young claims that CALCRIM No. 223, by instructing the jurors to use direct and circumstantial evidence to "disprove the elements of a charge,"[4] improperly suggested that she was required to disprove an element of an offense (here, making a criminal threat in violation of § 422 as alleged in counts 1 and 2) to warrant acquittal. This is incorrect,

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4 As given by the court in this matter, CALCRIM No. 223, which defines and illustrates the concepts of direct and circumstantial evidence and guides the jury in the use and evaluation of such evidence, states in full: "Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to *prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Last italics added.)

she asserts, because due process imposed on the prosecution the burden of proving the elements of the offense beyond a reasonable doubt, and her only burden was to show a reasonable doubt. Young also asserts the corresponding CALJIC instruction, CALJIC No. 2.00, by stating that "direct and circumstantial evidence are acceptable as a means of proof," does not suffer from this defect because it omits any suggestion a defendant must disprove the elements of the offense.[5]

Young also claims that CALCRIM No. 302,[6] by directing jurors to "decide what evidence, if any, to believe" in case of a conflict, is legally incorrect because evidence can raise a reasonable doubt even if the jury does not believe it. Specifically, Young asserts, "[i]f there is a conflict in the evidence, exculpatory evidence that is sufficiently

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[5] CALJIC No. 2.00 states: "Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact. [¶] Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. [¶] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [¶] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] [It is not necessary that facts be proved by direct evidence. They also may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both *direct and circumstantial evidence are acceptable as a means of proof.* Neither is entitled to any greater weight than the other.]" (Italics added.)

[6] CALCRIM No. 302, as given by the court in this matter, states in full: "If you determine there is a conflict in the evidence, you must *decide what evidence, if any, to believe*. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point." (Italics added.)

weighty to create a reasonable doubt necessitates acquittal, whether or not jurors affirmatively *believe* that evidence," and the directive of CALCRIM No. 302 requiring jurors to decide what evidence to "believe" blurs the distinction between inculpatory and exculpatory evidence in violation of the due process clause of the Fourteenth Amendment because to find reasonable doubt, jurors need not believe any exculpatory evidence, and they need only conclude the conflicting evidence is sufficient to create a reasonable doubt. She also asserts the corresponding CALJIC instruction, CALJIC No. 2.22, does not suffer from this defect, because it makes no reference to "believing" evidence on either side of a conflict, and instead states that jurors must assess the "convincing force of the evidence."[7]

Thus, Young maintains, CALCRIM Nos. 223 and 302 are constitutionally defective because, taken together, they undermine the presumption of innocence and shift the burden of proof to the defendant by improperly telling jurors that the defendant must do more than raise a reasonable doubt, either by disproving an element of the charged offense, or by presenting exculpatory evidence that the jury "believes."

Young's claims are unavailing. "When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions given as a whole, not in

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7 CALJIC No. 2.22 states: "You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the *convincing force of the evidence*." (Italics added.)

isolation. [Citation.]" (*Rundle, supra,* 43 Cal.4th at p. 149.) Here, Young's constitutional challenges to CALCRIM Nos. 223 and 302 violate this fundamental rule.

With respect to CALCRIM No. 223, Young first improperly isolates the phrase "prove or disprove the elements of a charge," which appears in the following complete sentence contained in that instruction: "Both direct and circumstantial evidence are acceptable types of evidence to *prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other." (Italics added.) Then, taking the word "disprove" out of context, Young complains that this word incorrectly suggests to the jury that the defense must disprove an element of the charged offense, thereby shifting the burden of proof to the defendant to disprove her guilt.

Through this linguistic isolation technique, which the Supreme Court has disapproved (see *Rundle, supra,* 43 Cal.4th at p. 149), Young has distorted the meaning of the phrase "prove or disprove the elements of a charge" in CALCRIM No. 223. A full, contextual reading of the sentence in which that phrase appears reveals that CALCRIM No. 223 plainly instructs the jury that neither direct evidence nor circumstantial evidence is necessarily more reliable than the other, and both types of evidence are acceptable in proving or disproving the elements of a criminal charge that are "necessary to a conviction." Because a defendant may, if she chooses, present direct or circumstantial evidence in an attempt to obtain an acquittal by disproving an essential element of a charged offense, the foregoing language in CALCRIM No. 223 properly informs the jury that both types of evidence are "acceptable to . . . disprove the elements of a charge," and

neither is "necessarily more reliable than the other." This language is legally correct, and in no way suggests, as Young contends, that the defense *must* disprove an element of the charged offense, such that the burden of proof shifts to the defendant to disprove her guilt.

Furthermore, as our high state court recently explained, "[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Here, Young has not, and cannot, meet her burden of demonstrating a reasonable likelihood the jury understood the phrase "prove or disprove the elements of a charge" in CALCRIM No. 223 in the manner she asserts. The record shows the court instructed the jury under CALCRIM No. 220 that Young was presumed innocent, the prosecution had the burden of proving her guilt beyond a reasonable doubt, and the jury was required to find her not guilty "[u]nless the evidence prove[d] [her] guilty beyond a reasonable doubt."

In challenging CALCRIM No. 302, Young again violates the rule in *Rundle, supra,* 43 Cal.4th at page 149, by first isolating the phrase "decide what evidence, if any, to believe," which appears in the following complete sentence contained in that instruction: "If you determine there is a conflict in the evidence, you must *decide what evidence, if any, to believe*." (Italics added.) Then, by taking the word "believe" out of context, Young complains that CALCRIM No. 302, "[a]s applied to exculpatory evidence, . . . improperly puts on a defendant the burden of pointing to exculpatory evidence that the jury '*must . . . believe*'" (italics added), thereby shifting the burden of

proof to the defendant to disprove her guilt. Using the same linguistic isolation technique, Young has distorted the meaning of the phrase "decide what evidence, if any, to believe" in CALCRIM No. 302. A full, contextual reading of CALCRIM No. 302 shows that this instruction plainly and correctly instructs the jurors that when they are presented with conflicting evidence, they must decide what evidence, "if any," to believe. The phrase "if any" indicates the jury is *not* required to believe exculpatory evidence presented by the defendant in order to find reasonable doubt. Also, Young has misconstrued the phrase "must decide" to mean "must . . . believe." Furthermore, CALCRIM No. 302, like CALCRIM No. 223, must be read in light of the court's instructions (discussed, *ante*) that Young is presumed innocent, the prosecution has the burden of proving her guilt beyond a reasonable doubt, and the jury is required to find her not guilty "[u]nless the evidence prove[d] [her] guilty beyond a reasonable doubt."[8]

In sum, the court did not commit instructional error or violate Young's right to due process. Accordingly, we affirm the judgment.

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8 In light of our foregoing conclusions, we need not address Young's remaining contention that "[t]he People cannot prove beyond a reasonable doubt that the error[s] in CALCRIM [Nos.] 223 and 302 [were] harmless with respect to counts 1 and 2, the criminal threats against Wright and Rossio."

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.